BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE ALLISON	)	
Claimant	)	
	)	
VS.	)	
	)	
SOUTHERN CAL TRANSPORT	)	
Respondent	)	Docket No. 268,401
	)	
AND	)	
	)	
WAUSAU UNDERWRITERS	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 31, 2003 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on April 13, 2004.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Lynn M. Curtis, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 15 percent functional impairment to the body as a whole, rejecting any claim for permanent total or work disability benefits.

The claimant appealed this determination, alleging a variety of errors. The principal thrust of claimant's argument is that the physicians who examined him both agree he can no longer work as a semi tractor/trailer driver. According to claimant, this finding, when coupled with his age and limited educational and vocational background, render him permanently and totally disabled. In the alternative, claimant maintains he's entitled to a substantial work disability finding.

The respondent and its carrier contend the ALJ's Award should be affirmed in all respects. Respondent provided claimant with an accommodated job within the treating physicians' restrictions. However, respondent maintains the videotape evidence justifies limiting claimant's recovery to a functional impairment as it is clear claimant is well capable of performing his work-related job duties in the unaccommodated position he held prior to his injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a 73 year old individual who was supplementing his retirement income by working for respondent as a truck driver. Claimant worked one to three days a week, generating an average weekly wage of $288.79. At oral argument neither party disputed this figure and therefore the Board adopts the ALJ's factual finding.

On January 2, 2001, claimant was in the process of dropping off a trailer when he slipped on the ice, fracturing his left hip. The compensability of his injury is not questioned. Medical treatment was immediately offered and claimant was paid temporary total disability benefits for the 40.61 weeks he was off work.

After the hip fracture was stabilized with metal hardware, claimant's care was assumed by Dr. Michael Schmidt, a board certified orthopaedic surgeon. Dr. Schmidt testified that claimant's "subtrochanteric hip fracture had healed but with some shortening that resulted in a permanent Trendelenburg gait abnormality, which is another way of saying it resulted in weakness of the muscles that controlled the hip and forced him to limp as a result".[1] Dr. Schmidt recommended claimant refrain from climbing, working on ladders, working at unprotected heights and specifically felt claimant was at risk for further injury by climbing in and out of semi-tractor/trailer rigs.[2]

On June 4, 2001, claimant was offered light duty consistent with Dr. Schmidt's restrictions. Claimant reported for work on June 8, 2001, and for over a year, he worked for respondent 12 hours per week, performing light clerical duties and odd delivery jobs in a small passenger truck. On two occasions he attempted to drive the large trucks but

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[1] Schmidt Depo. at 8

[2] *Id*. at 9.

found the process very painful. He complained about pain in his hip while shifting and while sitting in the truck for periods longer than an hour. Claimant was apparently unwilling to do any further driving of these large trucks.

As of February 28, 2002, claimant was released from treatment. Dr. Schmidt found claimant to be at maximum medical improvement and imposed permanent restrictions These restrictions are identical to those he imposed earlier and included an additional 50 pound occasional weight limit.[3] Dr. Schmidt specifically precluded claimant's return to driving semi-tractor/trailer rigs as he once did for respondent.[4]

Claimant continued to work for respondent in the accommodated position from June 8, 2001 until October 23, 2002. This job paid him $11.25 an hour and he worked 12 hours per week. At that time, claimant was advised that respondent no longer desired his services. Since that date, claimant has not worked nor has he made any effort whatsoever to attempt to locate suitable employment.

Dr. Schmidt testified that claimant bears a 15 percent permanent partial disability to the body as a whole as a result of his hip fracture based upon the principles set forth in the *Guides*.[5] He also opined that, based upon the vocational analysis provided by Bud Langston, claimant's vocational specialist, claimant has lost the ability to perform 12 or 13 of the 17 identified tasks.[6] Alternatively, Dr. Schmidt precluded claimant from performing 10 of 20 tasks identified by Dick Santner, respondent's vocational specialist.

In contrast, claimant sought out the opinion of Dr. Daniel D. Zimmerman. Dr. Zimmerman assigned a 19 percent impairment to the body as a whole as a result of the hip fracture. Dr. Zimmerman's restrictions include 20 pounds on an occasional basis, 10 pounds frequently, and claimant should avoid frequent bending, stooping, squatting, crawling, kneeling or twisting activities, he should stand only 15 to 20 minutes and stay seated 30 to 45 minutes. Given these restrictions, Dr. Zimmerman testified that claimant had lost the ability to perform 16 or the 17 tasks identified by Bud Langston.

Mr. Langston is of the opinion that claimant, with his inability to sit for long periods, advanced age and ninth grade education, is essentially unemployable as his present

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[3] *Id* at 15.

[4] *Id.* at 16.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[6] It is unclear from the record whether Dr. Schmidt precluded 12 or 13 tasks. For further reference and convenience of all concerned, the parties are encouraged to inquire on the record as to the total number of tasks precluded by the testifying medical practitioner.

restrictions (specifically those by Dr. Zimmerman) preclude him from performing any of the jobs he has performed during the past 15 years.

On the other end of the evidentiary spectrum are the vocational opinions of Dick Santner. Mr. Santner testified that claimant should be able to go back to work as a truck driver and would therefore experience no wage loss whatsoever as a result of his work-related injury.[7] He further clarified his position by stating that claimant would only be able to drive the truck, he would not be able to tarp or unload the contents of the trucks he was driving and Mr. Santner also testified claimant was capable of working at a fast food restaurant, driving a dump truck, performing some production welding jobs, and working as a school bus driver, taxi driver or limousine driver, assuming he could obtain the necessary licenses. While working for respondent, claimant had a Commercial Driver's License (CDL) but he voluntarily let that license expire after leaving respondent's employ as he felt he was unable to drive.

At the Regular Hearing in July 2003, claimant was questioned about his capacity to engage in certain activities. He testified he was able to kneel on his right knee for approximately 30 seconds to a minute[8] and totally unable to crouch.[9] He also testified that he could no longer stoop, squat or bend into different positions in order to do "mechanic-ing", [sic] welding and general household repair.[10] Claimant specifically denied changing any car tires after his hip surgery.[11]

The crux of the parties' dispute in this case stems from claimant's request for permanent total disability benefits and/or work disability benefits. As is almost always the case, the claimant's credibility is a crucial factor in this determination. The ALJ awarded claimant solely a 15 percent functional impairment to the body as a whole, altogether rejecting any claim for work disability or permanent total disability benefits. It is clear from the Award that in denying claimant's claim for anything other than a functional impairment, he was relying significantly on the contents of a videotape, procured over a series of dates between August 2002 and April 2003 by a private investigator at respondent's insurer's request. The ALJ explained that "[a]fter viewing the videotape . . . , the court believes

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[7] Santner Depo. at 23.

[8] R.H. Trans at 36.

[9] *Id.* at 35.

[10] *Id.* at 38-40.

[11] *Id.* at 43.

claimant's assertion that he was no longer able to drive because of the pain it caused is highly doubtful at best".[12]

The videotape at issue is approximately two hours in length and was shared with both Dr. Schmidt and Dick Santner. The tape shows claimant loading a horse into a trailer, working on and under a flatbed truck at what is apparently his home, replacing a set of tires on the left rear of that same flat bed truck, clearing some brush with a chain saw, painting some metal fence posts, repeatedly getting in and out of vehicles, bending down on one knee, stooping and carrying objects while walking with a slight antalgic gate. The video shows claimant working in a steady and methodical manner and not merely in short spurts of time. Obviously, the contents of this tape, coupled with claimant's denials at the Regular Hearing persuaded the ALJ that claimant's assertion he could no longer perform his regular job for respondent was less than credible.

Interestingly, Dr. Schmidt testified that he saw nothing within the videotape that violated the restrictions he had imposed.[13] Dr. Schmidt agreed with claimant's counsel that claimant's activities and conduct were consistent with the type of injury claimant suffered as well as his resulting surgery.[14] Indeed, at no point in the tape is claimant ever working at unprotected heights, climbing in or out of a semi-tractor/trailer truck, nor is it conclusively established that claimant lifted anything that exceeded the 50 pound limit. However, given claimant's denials at the Regular Hearing, there does appear to be an inconsistency between claimant's recitation of his capacity to perform certain activities and what he, in fact, is able to do.

As for claimant's allegation that he is permanently and totally disabled, the Board finds that claimant has failed to meet his burden of proof. An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[15] The *Wardlow* Court looked at all of the circumstances surrounding claimant's condition including the serious and permanent nature of the injuries, the extremely limited physical tasks he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision of whether the claimant was permanently and totally disabled. While it is uncontroverted by either physician who testified in this case that claimant cannot return to his former employment as a tractor/trailer driver, the Board is not persuaded that claimant is wholly unemployable and unable to engage in any substantial gainful employment. Claimant's own activities as

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[12] ALJ Award (Oct. 31, 2003) at 3, footnote 1.

[13] Schmidt Depo. at 45-46.

[14] *Id.* at 46.

[15] K.S.A. 44-510c(a)(2); Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

evidenced by the videotape reveal him as one who can readily get in and out of a car, and perform some limited vehicle maintenance, including changing a tire.

As indicated by Mr. Santner, claimant could work as a fast food worker, drive a taxi, a limousine, a small delivery truck, or even a school bus. The fact that claimant voluntarily let his CDL lapse bears upon this issue as well. Although his counsel offered a portion of what appears to be statutory authority indicating claimant was not qualified to hold a CDL, those documents were attached to a brief filed with the Board. They were not presented to the ALJ during the course of the trial. Issues not brought before the ALJ will not be considered for the first time on appeal.[16] Thus, the Board finds that they are not properly in evidence and should not be considered. Accordingly, the only evidence contained within the record shows that claimant voluntarily let his CDL lapse, thereby foreclosing those jobs that he might be qualified to perform.

Although not specifically stated in the Award, it is implicit in the ALJ's holding that he denied claimant's claim for permanent total disability benefits. The Board believes claimant is capable of substantial gainful employment and affirms the ALJ's finding on this issue.

Alternatively, claimant seeks modification of the ALJ's finding on the issue of permanent partial impairment and/or work disability. Although claimant suggests that Dr. Zimmerman's functional impairment rating of 19 percent to the whole body is "more complete and detailed in its analysis",[17] the Board affirms the ALJ's finding that Dr. Schmidt's rating of 15 percent impairment is more appropriate. Dr. Schmidt was the treating physician and was, under these facts and circumstances, in a better position to evaluate claimant's impairment and his ultimate limitations. Additionally, Dr. Schmidt utilized the *Guides*[18] as required by K.S.A. 44-510e(a). Thus, the 15 percent functional impairment to the body as a whole is affirmed.

Whether claimant is entitled to work disability is governed by K.S.A. 44-510e. That statute states in part:

> . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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[16] Bergstrom v. Borton LC, No. 1,010,421, 2003 WL 22150564 (Kan. WCAB Aug. 29, 2003).

[17] Claimant's Brief at 2 (filed on Dec. 15, 2003).

[18] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. . .[19]

The Kansas Appellate Courts, beginning with *Foulk,*[20] have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of her pre-injury wage at a job within her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[21] Before claimant is entitled to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[22]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[23] where the accommodated job violates the worker's medical restrictions,[24] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[25]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. In this instance, the ALJ concluded claimant had abandoned his job as a truck driver. The ALJ expressly found that it was the unaccommodated position as a truck driver and not the accommodated employment which

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[19] K.S.A. 44-510e (Furse 2000).

[20] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[21] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[23] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[24] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[25] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

claimant abandoned.[26] Clearly, the ALJ believed claimant was fully capable of performing his regular duties as a part-time truck driver for respondent. This view was expressed not only by the ALJ but by Dick Santner as well, although Dr. Schmidt and Dr. Zimmerman believed that not to be the case.

After considering the parties' arguments and a close review of the videotape, being mindful of the ALJ's unique opportunity to evaluate the claimant and his credibility, the Board is ultimately persuaded by Dr. Schmidt's opinion that claimant is unable to return to his former occupation as a truck driver in an unaccommodated position. For this reason, the ALJ's Award should be modified to reflect a work disability, to the extent it exceeds his 15 percent functional impairment.

Respondent certainly pointed out inconsistencies within claimant's testimony as to his physical capabilities, but Dr. Schmidt's testimony is uncontroverted that claimant cannot return to his former job as a truck driver. Dr. Schmidt even viewed the videotape that clearly compromises some of claimant's own factual contentions. Nonetheless, he testified that claimant's activities as depicted on the tape do not violate claimant's restrictions. Based upon this evidence, the Board finds claimant did not demonstrate a lack of good faith by failing to return to his job with respondent as a truck driver, as that job would have required him to get in and out of a semi-tractor/trailer in clear violation of Dr. Schmidt's restrictions.

Although he performed an accommodated job for over a year, that job paid $11.25 an hour for an average weekly wage of $135. When compared to his pre-injury part-time employment, this difference yields a wage loss of 53 percent for the period he was employed post-injury.

Once claimant was involuntarily terminated from respondent's employ on October 24, 2002, his actual wage loss increased. However, there is no evidence that claimant has made any effort whatsoever to obtain appropriate employment, either part-time or full-time. Claimant argues that by working at the accommodated position for respondent in excess of a year, he has satisfied the "good faith" requirement imposed under Kansas law. The Board disagrees. The obligation to demonstrate "good faith" does not evaporate by performing accommodated duty for a limited period of time. Once any accommodated employment situation ends, it is incumbent upon the claimant to seek out alternative employment in order to minimize any work disability. To hold otherwise would violate the principles expressed in *Foulk*.[27]

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[26] ALJ Award (Oct. 31, 2003) at 3, footnote 1.

[27] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Here, even after claimant was told his services were no longer wanted, he did nothing to secure alternative employment. Under these facts, the law allows the fact-finder, here the Board, to impute a wage. Although there is no evidence within the file as to what an individual could expect to make as a production welder or the driver of a bus, limousine or taxicab, the Board routinely imputes a federal minimum wage of $5.15 per hour in such instances. Thus, the Board shall impute a wage of $5.15 per hour, for 12 hours per week. This reflects the part-time nature of claimant's pre-injury wage and is consistent with the Board's practice when dealing with part-time employees who suffer a wage loss following a compensable injury.[28] This yields a weekly wage of $61.80 and translates into a 78 percent wage loss for the period commencing October 24, 2002.

The other component to consider is the task loss. Both Drs. Zimmerman and Schmidt have offered opinions as to claimant's relative task loss. Only Dr. Schmidt had the benefit of both the Santner and Langston vocational analyses. After considering both physicians' opinions, the Board is persuaded that Dr. Schmidt's opinions based upon Mr. Santner's analysis is the more persuasive of the two. Mr. Langston's vocational analysis included some tasks that claimant did only rarely or that were more sedentary in nature than as described by Mr. Langston. Given this limitation, the Board is finds Mr. Santner's analysis is more indicative of the claimant's actual task loss. Accordingly, claimant is found to have sustained a 50 percent task loss.

When the 50 percent task loss is averaged with the 53 percent task loss, the result is a 51.5 percent work disability for the period claimant worked at his accommodated position. On October 24, 2002, claimant's work disability increased to 64 percent, reflecting an average of the 50 percent task loss and the increased wage loss of 78 percent.

All other findings and conclusions contained within the Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 31, 2003, is modified as follows:

The claimant is entitled to 40.61 weeks of temporary total disability compensation at the rate of $192.54 per week or $7,819.05 followed by 22.29 weeks of permanent partial disability compensation at the rate of $192.54 per week or $4,291.72 for a 15% functional disability followed by 71.71 weeks of permanent partial disability compensation at the rate of $192.54 per week or $13,807.04 for a 51.5% work disability followed by 155.21 weeks

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[28] *Moeller v. Wal-Mart*, No.245,545, 2002 WL 985404 (Kan. WCAB Apr. 11, 2002).

of permanent partial disability compensation at the rate of $192.54 per week or $29,884.13 for a 64% work disability, making a total award of $55,801.94.

As of April 13, 2004 there would be due and owing to the claimant 40.61 weeks of temporary total disability compensation at the rate of $192.54 per week in the sum of $7,819.05 plus 130.39 weeks of permanent partial disability compensation at the rate of $192.54 per week in the sum of $25,105.29 for a total due and owing of $32,924.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $22,877.60 shall be paid at the rate of $192.54 per week for 118.82 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Lynn M. Curtis, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director